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SUPREME COURT, U.S.

No. 99-651

IN THE

Supreme Court of the United States

KIM D. FIORIGLIO,

Petitioner,

v.

CITY OF ATLANTIC CITY, JAMES WHELAN, PAUL GALLAGHER, BENJAMIN BRENNER, TERRENCE MOONEY, DENNIS BROOKS, ATLANTIC CITY FIREFIGHTERS LOCAL 198, JOSEPH RUSH, JOHN DOE(S) 1-50, fictitious names(s) as individuals, and ABC CORPORATION(S) 1-50, fictitious names(s) as corporations and/or entities, i/j/s/a,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MAYOR JAMES WHELAN

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
Reasons for Denying the Writ	5
The Lower Court Correctly Applied Well Settled Law And Properly Granted Summary Judgment As Plaintiff Did Not Provide Sufficient Evidence To Establish That There Was A Genuine Issue Of Material Fact Thus The Petition For Writ Of Certiorari Should Be Denied.	5
A. Standard of Review	5
B. The District Court properly applied well established law in determining that Petitioner did not provide sufficient evidence of a violation of his Freedom of Speech to defeat a Summary Judgment Motion and therefore a review by this Court is not required.	7
C. The lower court never opined that Political Discrimination should or should not have a different standard of proofs than other employment discrimination cases.	11
Conclusion	12

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) 8, 11

Celotex Corp. v. Citrate, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) 8

Fireman's Ins. Co. of Newark v. DuFresne, 676 F.2d 965 (3rd Cir. 1982) 8

Lujan v. National Wildlife Fed'n, 497 U.S. 871, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) 9

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) 8

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 11

Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) 7, 9, 10, 11

Pollock v. American Tel. & Tel. Long Lines, 794 F.2d 860 (3d Cir. 1986) 8

Robertson v. Allied Signal, Inc., 914 F.2d 360 (3d Cir. 1990) 9

Cited Authorities

Page

Statutes:

42 U.S.C. § 1983 1

N.J.S.A. 11A:4-8 1

N.J.A.C. 4A:4-4.8 ..... 2, 10

United States Constitution:

First Amendment 1, 9, 10

Rules:

Federal Rule of Civil Procedure 12(b)(6) 4

Federal Rule of Civil Procedure 56 7

Federal Rule of Civil Procedure 56(c) 7

Federal Rule of Civil Procedure 56(e) 10

Federal Rule of Civil Procedure 60(b) 4

Federal Rule of Civil Procedure 60(b)(1) 4

United States Supreme Court Rule 10 ..... 5, 6, 9

STATEMENT OF THE CASE

Petitioner, Kim Fioriglio, claims that Respondent, Mayor James Whelan, conspired with the other defendants to prevent his promotion to Battalion Fire Chief because he ran for Mayor of Atlantic City against Respondent Whelan. Petitioner's complaint included an action for conspiracy under 42 U.S.C. § 1983 based on a First Amendment violation. The Petitioner has not argued that the grant of Summary Judgment as to his other claim, i.e., state claims for defamation and tortious interference with his business activities, claims under the New Jersey Constitution to free speech and expression, New Jersey Law Against Discrimination and the New Jersey Conscientious Employee Protection Act, were incorrectly decided.

The City of Atlantic City (City) is a municipal corporation within the jurisdiction of New Jersey Department of Personnel (hereinafter "NJDOP"). All appointments and promotions made by the City are from a list generated by the NJDOP. The City had some discretion to decide who to promote. Under the "Rule of Three", N.J.S.A. 11A:4-8, the City can, with limited exceptions such as veteran's preferences, appoint any of the top three candidates. (App. 7a-9a))[1] The City also has the discretion to choose among candidates when there is a tie. *Id.*

On September 22, 1990, Petitioner took the written examination given by the NJDOP for the position of Battalion Fire Chief for Atlantic City. (App. 3a) On November 21, 1991, he took the oral portion of the examination, which is calculated into the candidates test score. (*Id.*)

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1. "App" refers to documents in Petitioner's Appendix.

After the examination, Petitioner was ranked first on the list. (*Id.*) The list was subsequently revised by NJDOP. On November 20, 1992, the NJDOP posted the results and Petitioner ended up in a four way tie with Dennis Brooks ("Brooks"), Terrence Mooney ("Mooney") and Daniel Tamburilla ("Tamburilla"). (App. 4a) All four were Captains in the Atlantic City Fire Department. In 1993, due to a veteran's preference, Brooks was promoted to Battalion Fire Chief. (*Id.*) Thereafter, a three-way tie existed between the remaining candidates.

James Whelan has been the Mayor of Atlantic City since 1990. In 1994, Mayor Whelan was a candidate for re-election as Mayor. (App. 4a-5a) In February 1994, Petitioner announced his candidacy for the office of Mayor of Atlantic City. (*Id.*) Petitioner was a minor fringe candidate under the Natural Law Party.

During the campaign, Petitioner alleged that he revealed a number of improprieties and irregularities associated with Whelan's administration. (*Id.*) On May 12, 1994, Petitioner was defeated by Mayor Whelan. (*Id.*) The Petitioner received less than two-hundred votes. (*Id.*)

Subsequently, by letter dated October 14, 1994, the NJDOP advised all local appointing authorities about the amendment to N.J.A.C. 4A:4-4.8, which required a statement of reasons why an appointee was selected over another eligible in the case of a tie. (App. 6a-7a) Pursuant to the amendment to the regulation, Executive Order No. 3 was promulgated. (*Id.*) The Order provided the following considerations in deciding whom to promote:

1) Disciplinary History

2) Education

3) Sick Leave Abuse

4) Diversity

5) Residency

6) Raw Score

Following the adoption of Executive Order No. 3, co-defendant Brenner recommended Mooney and Tamburilla for promotion. (*Id.*) Brenner has been Fire Chief in Atlantic City since May 1991. Brenner's role in promotions is to make recommendations to the Mayor concerning whom to promote. The Mayor has followed Brenner's recommendation in every case. Whelan never told Brenner that he wanted a particular person promoted.

Whelan, consistent with his normal practice, accepted Brenner's recommendation and promoted Tamburilla and Mooney to the position of Battalion Fire Chief in December 1994. (App. 8a)

Prior to instituting the district court action, Petitioner filed appeals with the New Jersey Public Employment Relations Commission ("NJPERC) and NJDOP alleging that he was not promoted to Battalion Chief in retaliation for his Mayoral campaign against Mayor Whelan. Both agencies found no basis to challenge the Petitioner's non-selection.

On May 9, 1996, the Petitioner filed an action in the District Court of New Jersey. He amended his complaint on

June 12, 1996 (*Id.*). The complaint alleges that Petitioner is the victim of a conspiracy by Respondent Whelan, and the other defendants, to deprive him of a promotion because of his campaign for Mayor in 1994.

Respondent Whelan, and the other defendants, filed Motions to Dismiss pursuant to the Entire Controversy Doctrine and Rule 12(b)(6). (App. 32a) On May 6, 1997, the District Court denied the motions to dismiss under the entire controversy doctrine. (*Id.*) The District Court, however, dismissed the defamation and the NJLAD claim. (*Id.*)

After extensive discovery, Respondent Whelan, and the other defendants, filed Motions for Summary Judgment. On March 5, 1998, the District Court granted the motions and dismissed the remaining counts of Petitioner's complaint. (App. 2a)

On or about March 17, 1998, Petitioner filed a Motion for Relief from Judgment under Fed. R. Civ. P. 60(b)(1) to open up the Judgment for consideration of three unsigned, unsworn statements submitted below. On April 8, 1998, the District Court denied Petitioner's Motion for Relief.

On or about May 8, 1998, the plaintiff filed an appeal with the United States District Court of Appeals for the Third Circuit appealing the District Court's grant of summary judgment and denial of his Motion for relief under Fed. R. Civ. P. 60(b). On June 8, 1999, the Court of Appeals affirmed the District Court's decision. (App. 1a)

Plaintiff subsequently filed a Petition for Rehearing and Rehearing En Banc on or about June 21, 1999, which was denied by the Court of Appeals on July 8, 1999. (App. 52a)

REASONS FOR DENYING THE WRIT

THE LOWER COURT CORRECTLY APPLIED WELL SETTLED LAW AND PROPERLY GRANTED SUMMARY JUDGMENT AS PLAINTIFF DID NOT PROVIDE SUFFICIENT EVIDENCE TO ESTABLISH THAT THERE WAS A GENUINE ISSUE OF MATERIAL FACT THUS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A. Standard of Review

Rule 10 of the Rules of the Supreme Court of the United States provide the standard governing review on certiorari. Rule 10 provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a

> departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

In this case, the petition does not fall under any of the reasons set forth in Rule 10. Nor does the Petitioner provide any other compelling reasons as to why his petition should be granted. The decision of the District Court to grant Summary Judgment to Respondent Whelan was a correct application of settled law.

B. The District Court properly applied well established law in determining that Petitioner did not provide sufficient evidence of a violation of his Freedom of Speech to defeat a Summary Judgment Motion and therefore a review by this Court is not required.

At the outset, I object to the Petitioner's claim that there was only limited discovery in this case. In fact, there was extensive discovery, which included at least nine (9) depositions. However, Petitioner never presented any evidence that would lead a reasonable jury to find in his favor. I also object to his claim that he was first on the list. In reality, he was in a three-way tie with two other firefighters.

Turning to the substance of the petition, the lower court properly addressed the legal standards in granting Summary Judgment to Respondent Whelan. The lower court looked to Fed. R. Civ. P. 56(c) and case law for the standard for summary judgment. The Court also looked to *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) to determine if Petitioner has shown that his alleged constitutionally protected activity was the substantial and motivating factor for his nonselection for battalion chief. (App 8a-9a, 12a)

The standard for a summary judgment motion in federal court is set forth in Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c) provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).

A fact is material if it might affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In addition, a dispute over a material fact must be genuine, i.e., the evidence must be such "that a reasonable jury could return a verdict in favor of the non-moving party." *Id.*

In a summary judgment motion, the Court must construe all reasonable inferences in a light most favorable to the non-movant. *Pollock v. American Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986). The moving party has the initial burden to identify evidence that it believes shows an absence of a genuine issue of material fact. *Celotex Corp. v. Citrate*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the non-moving party will bear the burden of proof at trial, the moving party's burden can be discharged by "showing — that is, pointing out to the district court — that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The non-moving party may not rely merely upon bare assertions, conclusory allegations or suspicions. *Fireman's Ins. Co. of Newark v. DuFresne*, 676 F.2d 965, 969 (3rd Cir. 1982). To defeat the motion for summary judgment, the non-moving party must offer specific facts contradicting those set forth by the movant, thereby showing that there is a genuine issue

for trial. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990). Inferences "based on speculation or conjecture [do] not create a material factual dispute sufficient to defeat entry of summary judgment." *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 383, n.12 (3d Cir. 1990).

The Petitioner has not claimed that the lower court did not apply the correct standard for Summary Judgment. Nor does he argue that the decision was in conflict with other circuits or this Court's decisions. He is essentially claiming that the lower court misapplied the law to the facts. That is not the case. Further, pursuant to Rule 10, certiorari is rarely granted on those grounds and should not be granted in this case.

In *Mt. Healthy*, *supra*, this Court addressed the legal standard applicable in retaliation cases in violation of free speech under the First Amendment. This Court found that the initial burden is on the complainant to show that their conduct was constitutionally protected and that such conduct was the "substantial" or "motivating" factor for the alleged adverse action. 429 U.S. at 287 If the complainant carries that burden, then the burden shifts to the employer to show by a "preponderance of the evidence" that they would have taken the same action despite the constitutionally protected activity. *Id.*

The lower court properly and correctly applied standard set forth in *Mt. Healthy*, *supra*, to this case. Although citing a different case, this is the very test that Petitioner states should have been utilized in his brief at page 9.

In this case, Petitioner claims that Executive Order #3, which set forth six (6) criteria to be considered when breaking a tie, was promulgated solely to prevent his promotion. However, he could not point to any material facts or evidence to support that contention. Petitioner claims were conclusory and based on speculation and conjecture only. Such speculation and conjecture cannot overcome a motion for summary judgment. To the contrary, the Respondent provided evidenced that the policy was promulgated pursuant to the revision to NJDOP's N.J.S.A 4A:4-4.8, which now require a statement of reasons for promotions.

Contrary to Petitioner's claim in his brief, there was no admissible evidence proffered by Petitioner to demonstrate any alleged remarks made by the Mayor or any other officials during or after the hiring process. The Petitioner submitted three (3) unsigned, unsworn statements in violation of Fed. R. Civ. P. 56(e), which were correctly not considered by the lower court.

The lower court also correctly stated that the Petitioner, in his brief in opposition to Summary Judgment, failed to address the issue of whether his conduct was constitutionally protected, which is contrary to the *Mt. Healthy* standard and the standard set forth in Petitioner's brief. (App. 11a) Nevertheless, the lower court applying the proper standard found that political campaigning is protected speech under the First Amendment, but that Petitioned did not proffer sufficient evidence to support his claim that his political campaign against Mayor Whelan was the substantial and motivating factor in his not being promoted to Battalion Chief.

It is evident that the lower court correctly applied the standard for summary judgment and the governing

substantive law in rendering the decision in this case. Thus, a review by this Court is not warranted.

C. The lower court never opined that Political Discrimination should or should not have a different standard of proofs than other employment discrimination cases.

The case at hand involved a claim of retaliation based on a violation of a constitutionally protected activity, i.e. Freedom of Speech. The District Court properly stated that the "substantive law governing the dispute will determine which facts are material, and only disputes over those facts, 'that might affect the outcome of the suit under the governing law will properly preclude entry of summary judgment.' " *Anderson*, *supra*, 477 U.S. at 248 (App. at 9a) The district court applied the governing law set forth in *Mt. Heathy*, *supra*, which discussed retaliation in violation of free speech.

Petitioner is apparently attempting to make a comparison between the standards set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which dealt with Title VII of the Civil Rights Act of 1964, and *Mt. Healthy*, *supra*. However, in both cases the standards are similar, with the initial burden being placed on the complainant to show protected status or activity and adverse action being taken because of that status or activity. Then the burden shifts to the employer to show a legitimate reason for the action taken.

In any event, the lower court in reviewing the record correctly applied the proper standard and found that the Petitioner did not carry his burden by providing sufficient evidence to defeat the motion for summary judgment. Contrary to Petitioner claim, the lower court plainly and

clearly knew how to weigh the evidence in this case. Petitioner simply did not submit any evidence that established any material facts. Thus, the review of this issue is not warranted by this Court as the correct standards were applied.

CONCLUSION

Based on the foregoing, the Petition for a Writ of Certiorari should be denied as the lower court properly applied settled law, which is not in conflict with any other circuits or with relevant decisions of this Court. Thus, revisiting this issue is not warranted by the Court.

Respectfully submitted,

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